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No. 06-580

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE HYDE PARK CENTRAL SCHOOL DISTRICT,

Petitioner,

v.

FRANK G. AND DIANNE G., Parents of a Disabled Student, ANTHONY G.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits a court to order, as "appropriate" relief, that public school authorities reimburse parents for private school tuition for a disabled child who had never been enrolled in public school and thus had not "previously received special education and related services under the authority of a public agency," 20 U.S.C. § 1412(a)(10)(C)(ii), where the public school district conceded that it had not made a free appropriate public education available to the child, and the child's private school placement was appropriate under the Act.

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RESPONDENTS' BRIEF IN OPPOSITION

The petitioner, the Board of Education of the Hyde Park Central School District ("school district"), contends that a phrase in a provision of the Individuals with Disabilities Education Act ("IDEA"), added in the 1997 amendments, absolutely bars reimbursement for private school tuition to parents of a disabled child if the parents "have not first tried [a] public school special education placement." Pet. 3. The U.S. Court of Appeals for the Second Circuit unanimously rejected this contention and correctly held that the provision at issue, 20 U.S.C. § 1412(a)(10)(C)(ii), does not limit tuition reimbursement to parents of a child who had previously enrolled in public school or received special education and related services under the school district's authority. In so holding, the court explained that petitioner's construction of the Act conflicts with the overall statutory scheme and purpose: to make available to all disabled children a free and appropriate public education.

Case law addressing the question presented is sparse and undeveloped, and there is no conflict among the courts of appeals. The only other court of appeals to have addressed the question whether § 1412(a)(10)(C)(ii) prohibits tuition reimbursement for parents of a child who had not previously been enrolled in public school agrees with the Second Circuit's view that the IDEA does not bar reimbursement in that circumstance. *See M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1098-1100 (11th Cir. 2006). The First Circuit's decision in *Greenland School District v. Amy N*, 358 F.3d 150 (1st Cir. 2004), upon which petitioner relies, did not decide the question presented and is factually distinguishable; indeed, the Second Circuit in this case discussed *Greenland* at length and agreed with its disposition. Pet. App. 49a-54a.

The court of appeals' decision here is faithful to this Court's decisions in *School Committee of Burlington v.*

Department of Education, 471 U.S. 359 (1985), and *Florence County School District v. Carter*, 510 U.S. 7 (1993), both of which upheld the authority of a court to order tuition reimbursement under the IDEA for parents who unilaterally placed their disabled child in private school when the public school authorities failed to offer the child a free appropriate education and when the parents' private school placement was proper under the Act. Finally, the Second Circuit's interpretation of the contested language is shared by the United States Department of Education, the views of which are entitled to deference. There is no basis for further review here.

STATEMENT

It is established that during the 2001-02 school year, the public school district failed to make available to Anthony G. a free appropriate public education, that his private school placement was proper under the IDEA, and that the equities favor reimbursing his parents for the private school tuition. The question presented here is whether, despite these undisputed facts, the IDEA bars tuition reimbursement to Anthony's parents solely because Anthony had not previously received special education and related services under a public agency's authority. To understand why the Second Circuit's decision rejecting that position is correct and not worthy of review, it is necessary, first, to describe the IDEA and then to proceed to the facts of the case and the decision below.

1. The Statutory Scheme. Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education, or "FAPE," means "special education and related services," provided at public expense, that are tailored to the unique needs of the disabled child by means of an "individualized educational program" ("IEP"). *See id.*

§ 1401(9), (14), (26), (29) (defining these statutory terms); *id.* § 1414(d) (specifying IEP requirements); *see Bd. of Educ. v. Rowley*, 458 U.S. 176, 181-82 (1982). To accomplish its objectives, the IDEA provides federal financial assistance to states that submit plans to the Department of Education implementing the IDEA's policies and procedures, including the requirement that states make "a free appropriate public education . . . available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1). School districts unable to provide a child a FAPE in a public school setting may place a child in, or refer a child to, a private school or facility—at no cost to the parents—as a means of carrying out the IDEA's requirements. *Id.* § 1412(a)(10)(B)(i). Underscoring its intent that *all* disabled children be offered a FAPE, Congress amended the IDEA in 1997 to clarify that the states' obligation to identify, locate, and evaluate all children with disabilities residing within their borders (the "child find" obligation) includes "children with disabilities attending private schools." Pub. L. 105-17, § 101 (adding IDEA § 612(a)(3)(A)), 111 Stat. 37, 61 (1997), *codified at* 20 U.S.C. § 1412(a)(3)(A).

The IDEA affords comprehensive procedural protections, including the right to an impartial due process hearing and an administrative appeal, to parents dissatisfied with a school district's evaluation or placement of their child or with the provision of a FAPE. 20 U.S.C. § 1415(f) & (g). Aggrieved parties may challenge administrative decisions in state or federal court. *Id.* § 1415(i)(2). In any such action, the court "shall grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(C)(iii).

The 1997 IDEA amendments, Pub. L. 105-17, 111 Stat. 37, which made numerous changes to the Act, were enacted against the backdrop of key decisions by this Court regarding the power of courts to order private school tuition reimbursement for parents who unilaterally placed their child in private school

when the public school district had failed to make available to the child a free appropriate public education.

In 1985, this Court held in *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985), that 20 U.S.C. § 1415(e)(2) of the Education of the Handicapped Act (the predecessor to the IDEA)—a provision identical to the current 20 U.S.C. § 1415(i)(2)(C)—"confer[red] broad discretion on the court" to order school authorities to reimburse parents for private school tuition for their child if the court ultimately determined that such placement, rather than a proposed IEP, was proper under the Act. *Burlington*, 471 U.S. at 369. As the Court reasoned: "In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school." *Id.* at 370.

Observing, however, that a final decision on the appropriateness of an IEP often comes long after the school term has ended, the Court recognized that, in the meantime, "parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Id.* "If they choose the latter course," as "conscientious parents who have adequate means . . . normally would," *id.*, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." *Id.* Such a result would deny "the child's right to a *free* appropriate public education." *Id.* (emphasis in original). The Court pointed out that parents who unilaterally change their child's placement during the pendency of review proceedings, without school officials' consent, "do so at their

own financial risk" because, if the courts ultimately determine that the IEP was appropriate, the parents would be barred from obtaining reimbursement. *Id.* at 373-74.

In *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), this Court held that parents were not barred from reimbursement because the private school in which they unilaterally placed their child did not meet the IDEA's definition of "free appropriate public education," while reaffirming *Burlington*'s recognition of a court's broad authority to order school officials to reimburse parents for private school expenses if the court determines that such private school placement, rather than a proposed IEP, is proper under the Act. *Id.* at 12-14. The Court admonished that public school officials who wish to avoid reimbursing parents for private education "can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice." *Id.* at 15. It emphasized, however, that parents who unilaterally change their child's placement are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was appropriate under the Act. Equitable considerations, the Court reminded, bear on the court's choice of relief. *Id.* at 15-16.

The 1997 amendments to the IDEA did not alter the statute's grant of authority to a court to award "such relief as the court determines is appropriate," 20 U.S.C. § 1415(i)(2)(C)(iii), as construed by this Court in *Burlington* and *Carter*. Congress added a provision, however, concerning payment for private school education, *id.* § 1412(a)(10)(C)(ii), which contains the language on which petitioner relies to avoid its obligation to reimburse respondents. To understand that provision, it should be quoted in context:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency,* enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal

> of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);
>
> (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
>
> (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.
>
> * * *

20 U.S.C. § 1412(a)(10)(C) (emphasis added). As discussed below, the court of appeals recognized that the disputed provision, *id.* § 1412(a)(10)(C)(ii), does not say that tuition reimbursement is available *only* to parents of a disabled child who had previously received special education and related services from a public agency. Pet. App. 31-32a. The United

States Department of Education, which has rulemaking authority under the IDEA, agrees that the disputed provision is silent regarding a court's authority to order tuition reimbursement for children who have *not* previously received such public services, and that courts retain authority to order such reimbursement under 20 U.S.C. § 1415(i)(2)(C)(iii).

2. Factual Background. The facts as this case reaches this Court are now undisputed. The case arises out of the efforts of parents Frank and Dianne G. to obtain reimbursement for the private school tuition they incurred during the 2001-02 school year as a result of their local school district's failure to provide their child, Anthony G., a free appropriate public education. Since the age of three, Anthony has been diagnosed with Attention Deficit Hyperactivity Disorder. He attended private schools from 1997 to 2001, through fourth grade. As Anthony progressed from first to fourth grade, his performance worsened. In April 2000, in response to notification from Anthony's parents, the school district's Committee on Special Education ("CSE") classified Anthony as learning disabled under the IDEA, as well as under New York law. Pet. App. 6a. The CSE later changed Anthony's classification to "other health impaired." Pet. App. 57a.

Early in 2001, the school district began evaluating Anthony. An occupational therapy evaluation revealed that Anthony suffered deficits in visual memory and sequential memory skills. A math assessment exposed severe deficiencies in Anthony's subtraction and problem solving skills and below average skills in other areas. During an in-class behavior assessment, Anthony was observed engaging in substantial off-task behavior. Pet. App. 6a-7a. Dr. Miriam Lacher conducted an independent neuropsychological evaluation during the spring and early summer of 2001. She recommended, among other things, that Anthony receive individualized attention and a relatively small class size and that he be dropped down to a class size of 12, with an aide to assist him. *Id.* at 7a.

On August 8, 2001, the CSE reviewed Anthony's performance from the previous year and developed an IEP for the 2001-02 school year. The CSE recommended that Anthony be placed in a regular education class of 26 to 30 students at the Ralph R. Smith Elementary School ("Smith School"), a public school within the school district, and that he receive additional services to be provided at the school. Pet. App. 8a. Anthony's parents objected to the placement and requested an impartial due process hearing to reconsider it. In her letter to the school district, Anthony's mother emphasized that the Smith School's large class size would not be appropriate for Anthony, a position consistent with recommendations by Anthony's teachers and therapists. *Id.* at 8a-9a. An administrative hearing was held before an Impartial Hearing Officer ("IHO") in November and December 2001. In the meantime, Anthony's parents withdrew him from the private school he had been attending and enrolled him at the Upton Lake Christian School, also a private school. At Upton Lake, Anthony repeated fourth grade in a class of 14 students. *Id.* at 9a. Anthony's parents sought reimbursement at the hearing for the tuition they paid that school for the 2001-02 school year.

During the hearing before the IHO, the school district conceded that the public school placement offered to Anthony at the Smith School was not appropriate, and the IHO agreed with that concession. Pet. App. 9a, 11a; *see also id.* at 118a, 124a-125a (IHO decision); *id.* at 93a (State Review Officer ("SRO") decision). That left the school district with the defense that the Upton Lake placement was likewise inappropriate and that, therefore, the district should not be required to reimburse Anthony's parents for tuition costs. Although the IHO and, on administrative review, the SRO, denied reimbursement because they found the private school placement inappropriate, *id.* at 10a-12a, the district court, with the benefit of additional evidence adduced at trial regarding significant progress made by Anthony at Upton Lake, found

that the school was an appropriate placement for him under the IDEA. *Id.* at 12a-14a; *see also id.* at 68a-72a. The court of appeals affirmed the district court in this respect, *id.* at 21a-27a, and the appropriateness of Anthony's private school placement is not an issue before this Court. Relying on the IHO's determination that Anthony's parents were sincere in their desire to place Anthony in public school and that the equities favored tuition reimbursement, *id.* at 72a; *see id.* at 120a (IHO decision), the district court awarded the parents reimbursement in the amount of $3,660, as well as attorneys' fees. *Id.* at 14a, 74a. The court of appeals affirmed. *Id.* at 5a.

Not until the school district's reply brief in the court of appeals did it argue that the IDEA, as amended in 1997, provided it an "absolute defense" by purportedly barring tuition reimbursement to any child who had not "previously received special education and related services under the authority of a public agency," citing 20 U.S.C. § 1412(a)(10)(C)(ii).

3. The Court of Appeals' Decision. The Second Circuit rejected the school district's argument that the disputed phrase bars private school reimbursement where the child has not previously received special education and related services under the authority of a public agency.

First, the court of appeals rejected the school district's contention that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) prohibits reimbursement, noting that the provision "does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services." Pet. App. 31a-32a (emphasis in original). The court emphasized that 20 U.S.C. § 1415(i)(2)(C), interpreted by this Court in *Burlington* to authorize the equitable remedy of tuition reimbursement to parents who

enrolled their disabled child in private school while they successfully litigated the issue of the inappropriateness of his public placement, had gone unchanged by Congress in its 1997 revision of the statute. Pet App. 31a-35a. The court found Congress's re-adoption of the provision significant because of the presumption that Congress intends to adopt this Court's constructions of a statutory provision that Congress has included in a re-enactment. *Id.* at 35a. The court also pointed out that the school district's reading of § 1412(a)(10)(C)(ii) as restricting reimbursement to parents whose child had previously received public special education and related services "was inconsistent with the clear implication of § 1412(a)(10)(C)(i)," Pet. App. 35a, which provides that school authorities need not pay the cost of education at a private school or facility "if that agency made a free appropriate public education available to the child." § 1412(a)(10)(C)(i). That provision, the court of appeals reasoned, implied that reimbursement *is* potentially available where, as here, the opposite has occurred, and the school district has *not* made a FAPE available to the child. Pet. App. 36a.

The court of appeals concluded that petitioner's proffered interpretation of the disputed language was contrary to the express purpose of the IDEA, which was to ensure that a FAPE is available to *all* children with disabilities, and that nothing in the 1997 amendments or their legislative history suggested that Congress sought to alter prior law to constrain the power of a district court to award reimbursement for a private placement where a FAPE had not been provided to the child. Pet. App. 39a-40a. Noting that this Court had found that the statute "was intended to give handicapped children both an appropriate education and a free one" and that the Act should "not be interpreted to defeat one or the other of those objectives," the Second Circuit concluded that the construction urged by the school district "would defeat both purposes of the IDEA." Pet. App. 41a (quoting *Burlington*, 471 U.S. at 372, and *Carter*, 510

U.S. at 12-13). It found unenlightening the brief passage in the House Committee Report, H.R. Rep. No. 105-95, at 93 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 90, relied on by petitioner, *see* Pet. 7-8, 10, as it was merely an "awkward paraphrase" of the statutory language and did not address the availability of reimbursement when public special education and related services had not previously been provided. Pet. App. 46a.

Finally, the Second Circuit explained that the school district's interpretation of 20 U.S.C. § 1412(a)(10)(C)(ii) would produce absurd results, such as preventing children who had been provided with inadequate IEPs from receiving a free appropriate public education if their disabilities were detected before they reached school age. Pet. App. 41a. It would also place the parents of children with disabilities "in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement." *Id.* at 41a-42a. Yet, according to the school district, that is exactly what Anthony's parents were required to do to be reimbursed. The court of appeals correctly ruled that "[s]uch a 'first bite' at failure is not required by the IDEA." *Id.* at 42a.

REASONS FOR DENYING THE WRIT

It is now established that (1) the school district denied Anthony G. a free appropriate public education; (2) Anthony G.'s private school placement was appropriate under the IDEA; and (3) the equities favored reimbursing his parents for private school tuition for the 2001-02 school year. The only question is whether the disputed phrase in 20 U.S.C. § 1412(a)(10)(C)(ii) invariably prohibits a court from ordering reimbursement—even when the court believes such an award to be "appropriate" under 20 U.S.C. § 1415(i)(2)(C)(iii)—when parents refuse to experiment with their child's welfare and give a concededly improper public school placement "a

try." Pet. 13. For the reasons discussed below, that question does not merit further review.

REVIEW SHOULD BE DENIED BECAUSE CASE LAW ADDRESSING THE QUESTION PRESENTED IS SPARSE AND UNDEVELOPED, THERE IS NO SPLIT IN THE CIRCUITS, AND THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S CASE LAW.

I. Only two other courts of appeals have considered whether the disputed phrase in 20 U.S.C. § 1412(a)(10)(C)(ii) requires a disabled child to have accepted a public school placement—even an admittedly inappropriate one—as a prerequisite to reimbursement for private school tuition. As petitioner agrees, Pet. 17, in *M.M. ex rel. C.M. v. School Board of Miami-Dade County,* 437 F.3d 1085 (11th Cir. 2006), the Eleventh Circuit, like the Second Circuit, rejected that restrictive reading, holding that parents who placed their disabled child in private school were eligible for reimbursement for tuition and related services if the school board had denied the child a FAPE—even if the child had never been enrolled in public school. While pointing out that the hearing-impaired child in that case had received auditory-verbal therapy under the authority of a public agency through the age of three, the Eleventh Circuit went on to explain that sole reliance on the fact that the child never attended public school was legally insufficient to deny reimbursement. *Id.* at 1098. The court of appeals emphasized this Court's reasoning in *Burlington* that it would be an "empty victory" to tell parents years after they correctly challenged an inappropriate public placement that their private school expenses could not be reimbursed by school officials and that, if that were the case, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Id.* at 1099 (quoting *Burlington,* 471 U.S. at 370).

The Eleventh Circuit likewise cited this Court's admonition in *Carter* that the IDEA should not be read to defeat the statute's objective of ensuring that children with disabilities "receive an education that is both appropriate and free." *Id.* (quoting *Carter*, 510 U.S. at 13). Listing several district court decisions that had concluded that, even when a child has never enrolled in public school, reimbursement is proper if the school board fails to offer a sufficient IEP and a free appropriate public education, the court agreed that "forcing parents into accepting inadequate IEPs in order to preserve their right to reimbursement runs contrary to the rights recognized in the *Burlington* line of cases." *Id.*

Without any analysis or discussion, the petitioner cites the First Circuit's decision in *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004), as evidence of a circuit split. *See* Pet. 4, 10, 16. The Second Circuit discussed *Greenland* at length, and while it disagreed with a few statements made by the First Circuit in *Greenland*, it correctly treated *Greenland* as factually distinguishable and even agreed with the First Circuit's disposition of the case. Pet. App. 49a-54a.

Greenland held only that parents who had unilaterally removed their disabled child, Katie, from public school and placed her in private school, without notice to the school district and without offering school authorities an opportunity to prepare an IEP, were not eligible for tuition reimbursement. *Greenland*, 358 F.3d at 152-54, 160-62. Emphasizing the notice requirements specified in 20 U.S.C. § 1412(a)(10)(C)(iii), governing unilateral parental removal of a child from public school, the First Circuit explained that "[t]hese statutory provisions make clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and

determine whether a free appropriate public education can be provided in the public schools." *Greenland,* 358 F.3d at 160 (emphasis in original). "The purpose of the notice requirement," the First Circuit continued, "is to give public school districts the opportunity to provide FAPE before a child leaves public school and enrolls in private school." *Id.* at 161.

To be sure, the First Circuit stated that "tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school system (or perhaps those who at least timely requested such services while the child is in public school)," *id.* at 159-60, but it said so in the course of discussing the significance of the parents' complete failure to provide notice to the school district that their child was in need of special education and required an evaluation before withdrawing her from public school. As the First Circuit emphasized, "neither Katie's parents nor anyone else requested an evaluation for Katie while she was at Greenland." *Id.* at 160. She was removed from Greenland "for reasons having nothing to do with any issue about whether Katie was receiving FAPE." *Id.* "The point," the court stressed, "is that there was no notice at all to the school system before Katie's removal from Greenland that there was any issue about whether Katie was in need of special education." *Id.*

None of the discussion in *Greenland* has any bearing on the factual situation or question presented here. As the Second Circuit recognized, Anthony's parents gave the school district ample notice that he was in need of special education, after which the school district classified Anthony as disabled. Pet. App. 54a. And again, when the school district offered Anthony an IEP his parents believed inappropriate, his parents provided timely notice of their dissatisfaction to the school district. *Id.* Moreover, his parents' decision to keep Anthony in private school and not to accept the proffered inadequate public school placement had *everything* to do with the fact that the school

district had denied Anthony a free appropriate public education—which, again, petitioner concedes. Here, in contrast to the situation in *Greenland,* FAPE was very much "at issue." *Greenland,* 358 F.3d at 161 (quoting the heading of 34 C.F.R. § 300.403 (2006)).

The First Circuit simply did not address the issue whether 20 U.S.C. § 1412(a)(10)(C)(ii) bars a court from exercising its broad equitable discretion to award tuition reimbursement where parents provided the school district ample notice of their dissatisfaction, when the IEP recommending a public school placement was conceded by school officials to be inappropriate, where the parents' private school placement was proper under the statute, and where the child had never even been removed from public school because he had been enrolled in private school all along. As the First Circuit has since recognized, the 1997 amendments clarify the circumstances under which "[p]arents who unilaterally remove their child from public school" are entitled to private school tuition reimbursement. *Ms. M. ex rel. K.M. v. Portland Sch. Comm.,* 360 F.3d 267, 268, 271 (1st Cir. 2004). That situation did not arise here.

Indeed, the Second Circuit explained that it agreed with the First Circuit's resolution of *Greenland.* Pet. App. 52a. As the Second Circuit noted, not only do 20 U.S.C. § 1412(a)(10)(C)(iii)(I) & (III), added in the 1997 amendments, make clear that reimbursement may be reduced or denied if the parents fail to meet specific notice requirements before removing their child from public school or upon a judicial finding that the parents' conduct was unreasonable, Pet. App. 52a-53a, but even before the amendments were effective, the Second Circuit had held that it was inequitable to order reimbursement under circumstances such as those in *Greenland. Id.* at 53a. Citing its decision in *M.C. ex rel. Mrs. C. v. Voluntown Board of Education,* 226 F.3d 60 (2d Cir. 2000), the Second Circuit observed that "[c]ourts have held uniformly that reimbursement is barred where parents

unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP." *Id.* (quoting *M.C.*, 226 F.3d at 68)[1]; *see, e.g., Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523-24 (6th Cir. 2003); *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 381-82 (8th Cir. 1998).

Although there are a few district court decisions that are in conflict (mainly within the District of Maryland), *compare* Pet. 17 (citing *Lunn v. Weast*, 2006 WL 1554895 (D. Md. May 31, 2006); *Baltimore City Bd. of Sch. Comm'rs v. Taylorch*, 395 F. Supp. 2d 246 (D. Md. 2005); *T.H. ex rel. A.H. v. Clinton Twp. Bd. of Educ.*, 2006 WL 1128713 (D. N.J. Apr. 25, 2006)), *with Justin G. ex rel. Gene R. v. Bd. of Educ.*, 148 F. Supp. 2d 576 (D. Md. 2001), and *E.W. ex rel. J.W. v. Sch. Bd. of Miami-Dade County*, 307 F. Supp. 2d 1363 (S.D. Fla. 2004), this Court generally does not grant certiorari to resolve conflicts among or within district courts. *See* Supreme Ct. R. 10. A few more decisions from the courts of appeals may well clear up any disagreement that persists at the district court level. It is premature for this Court to conclude that a conflict exists that merits its attention.

II. It is a mark of just how undeveloped the case law is that no court, as best respondents' counsel can discern, has taken note of the United States Department of Education's interpretation of the disputed provision during the exercise of

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[1] In *M.C.*, the Second Circuit denied reimbursement to parents for psychological services for their child where they had provided no notice to the school district regarding the need for such services or their dissatisfaction with their child's IEP until long after the services had ended. The court of appeals noted that the 1997 amendments, which did not apply because the events pre-dated the amendments, codified that result. *M.C.*, 226 F.3d at 68-69 & n.9.

its rulemaking authority.[2] In preambles to the final rules issued by the Department of Education in 1999 (implementing the 1997 statutory amendments) and then again in 2006 (implementing the 2004 statutory amendments), the agency expressly rejected the construction petitioner advances here. Instead, the Department of Education interpreted the IDEA as continuing to confer authority on a court to order tuition reimbursement for parents' unilateral private placement of their disabled child when the school district has denied the child a free appropriate public education—even if the child did *not* first receive special education and related services from the school district. *See* 71 Fed. Reg. 46540, 46599 (Aug. 14, 2006); 64 Fed. Reg. 12406, 12602 (Mar. 12, 1999).

In the 1999 final rule preamble, the Department of Education, discussing 34 C.F.R. § 300.403, which largely tracked the statutory language of 20 U.S.C. § 1412(a)(10)(C), agreed with a commenter who requested that the agency clarify that the provisions of § 300.403(c), (d), & (e) (implementing 20 U.S.C. § 1412(a)(10)(C)(ii) & (iii)) apply only in situations in which the child previously has received special education and related services under the authority of a public agency. In other situations, hearing officers and courts retained broad equitable powers to award relief, applying the reimbursement standard announced in *Burlington*. The agency explained:

> As a commenter noted, hearing officers and courts retain their authority, recognized in *Burlington* and *Florence County School District Four v. Carter*, 510

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[2] The Second Circuit cited an interpretive letter from the Department of Education, however, expressing the view that the question presented in the query—whether actual receipt of special education and related services from a public school district is a prerequisite to a parent's ability to seek tuition reimbursement for a unilateral private school placement—was not answered or foreclosed by IDEA § 612(a)(10)(C). Pet. App. 43a-44a.

> U.S. 7 (1993) (*Carter*) to award "appropriate" relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section 615(i)(2)(B)(iii) [now § 615(i)(2)(C)(iii)] in instances in which the child has not yet received special education and related services. *This authority is independent of their authority under section 612(a)(10)(C)(ii) to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.*

64 Fed. Reg. at 12602 (emphasis added).[3]

The Department of Education recently repeated and expanded on this interpretive point in the preamble of its final rule issued in August 2006. There, in connection with proposed 34 C.F.R. § 300.148 (the renumbered version of the former 34 C.F.R. § 300.403), a commenter asked the agency to revise the regulations along the lines argued by petitioner here, to make it "clear that a unilateral placement in a private school

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[3] Without the benefit of briefing from respondents, the Second Circuit speculated that the contested "previously" phrase in 20 U.S.C. § 1412(a)(10)(C)(ii) may have suggested a reference to the IDEA's previous requirements. Pet. App. 46a-47a. A better reading, we submit, would be to read § 1412(a)(10)(C)(i) as providing a safe harbor protecting school authorities from reimbursement awards only if they make a FAPE available to the child, and to read clauses (ii) and (iii) as clarifying the circumstances in which parents of a child "who previously received special education and related services under the authority of a public agency" may obtain tuition reimbursement. Clause (ii), as the Department of Education agrees, does not address whether reimbursement is available to parents whose disabled children never received such services. This reading does not treat the contested phrase as superfluous, *see* Pet. 18, but rather, recognizes that the phrase describes the subset of children to which the requirements of (iii) pertain.

without first receiving special education and related services from the LEA [local educational agency] does not require the public agency to provide reimbursement for private school tuition." 71 Fed. Reg. at 46599. Reaffirming the continued applicability of the *Burlington-Carter* test for reimbursement to parents who unilaterally place their children in private school, the Department of Education refused "to include a provision relieving a public agency of its obligation to provide tuition reimbursement for a unilateral placement in a private school if the child did not first receive special education and related services from the LEA." *Id.* The agency reiterated that the authority under the IDEA to reimburse in this instance is "independent" of the court's or hearing officer's authority under IDEA § 612(a)(10)(C)(ii) to reimburse for private placements of children who previously were receiving special education and related services from a public agency. 71 Fed. Reg. at 46599. The Department admonished that school authorities can avoid reimbursement awards "by offering and providing FAPE consistent with the Act either in public schools or in private schools in which the parent places the child." *Id.*

As Congress has conferred IDEA rulemaking authority on the Department of Education, *see* 20 U.S.C. § 1406, the agency's interpretation of the statute in the course of conducting a notice-and-comment rulemaking is entitled to *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

III. Petitioner contends that the court of appeals' decision here is inconsistent with a statement this Court made in *Burlington* and conflicts with the Court's recent decisions in *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005), and *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455 (2006). Pet. 4-5, 6, 10-12, 14-15, 17-18. The Second Circuit's decision follows, not ignores, *Burlington*, and neither *Schaffer* nor *Arlington* has any bearing on the question presented.

The petitioner argues that the Second Circuit's holding is inconsistent with *Burlington*'s recognition that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." Pet. 15 (quoting *Burlington*, 471 U.S. at 373-74). That statement is plainly true and remains so under the Second Circuit's decision. The risk arises because, as this Court pointed out in *Carter*, parents are "entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." *Carter*, 510 U.S. at 15 (emphasis in original). If parents contest an IEP recommending a public school placement and unilaterally place their child in private school while administrative proceedings are underway, they do not know at that time whether their conviction that the IEP is inappropriate and that their own private school placement is proper will ultimately be vindicated during the administrative hearing process or in court. Here, of course, as this case reaches this Court, it is undisputed that Anthony's IEP was inadequate and that his private school placement was appropriate.

Similarly, the court of appeals' decision does not conflict with *Schaffer*, in which this Court held that the burden of proof at an impartial due process hearing on the appropriateness of an IEP lies with the party seeking relief. 126 S. Ct. at 531. Petitioner refers to language in *Schaffer* criticizing the parents there for asking the Court "to assume that every IEP is invalid until the school district demonstrates that it is not." Pet. 5 (quoting *Schaffer*, 126 S. Ct. at 536). Such language has nothing at all to do with this case, in which the school district *conceded* before the IHO that its proposed public placement of Anthony was inappropriate. Petitioner also emphasizes the Court's observation that Congress has amended the IDEA several times, including in 1997, "to reduce its administrative and litigation-related costs. For example, in 1997 Congress

mandated that States offer mediation for IDEA disputes." Pet. 6 (quoting *Schaffer*, 126 S. Ct. at 535). Again, that observation has nothing to do with the question presented here. The opportunity to mediate is not analogous to the opportunity to obtain reimbursement for private school tuition. The cost of an education is not a litigation or administrative cost.

The Court's decision in *Arlington* is equally inapposite. There, the Court ruled that the IDEA's fee-shifting provision, which allows a court to award reasonable attorneys' fees as part of the costs to parents who prevail in an action brought under the Act, does not authorize parents to recover fees for services rendered by experts in such actions. 126 S. Ct. at 2457. Petitioner cites *Arlington*'s instruction that, as Spending Clause legislation, the IDEA must be construed from the perspective of a state official deciding whether the state should accept IDEA funds. Pet. 17 (citing *Arlington*, 126 S. Ct. at 2459). That admonition is irrelevant here, where the Second Circuit's interpretation of the statute—that courts have power to order state officials to reimburse parents for private school tuition where the school district denied their child a FAPE—maintains the interpretation of courts' equitable powers under 20 U.S.C. 1415(i)(2)(C)(iii) that has governed for more than 20 years, an interpretation also long endorsed by the federal agency with rulemaking authority on the subject. Petitioner has pointed to nothing in the 1997 amendments or their legislative history that demonstrates that Congress intended to overturn *Burlington*'s long settled construction of courts' broad discretionary powers under the Act. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 116-17 & n.13 (2002) (Congress is presumed to know the background law when it acts and to expect that its enactments will be interpreted in conformity with Supreme Court precedents); *see also* Pet. App. 35a.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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